

Duplicate 4
The WHOLE of the
PROCEEDINGS

IN THE
Arches-Court of Canterbury,

In a CAUSE between the
Hon. Mrs. CATHERINE WELD,

Daughter to the Lord ASTON,

AND

EDWARD WELD Esquire,

Her HUSBAND.

CONTAINING,

- | | |
|--|---|
| I. Her LIBEL exhibited
against him for IMPO-
TENCY. | and also of three Mid-
wives who examin'd
Mrs. Weld; |
| II. Her ANSWER and
REPLICATION. | IV. COPIES of the DE-
POSITIONS of several
Noble Persons, relating
to this Cause. |
| III. CERTIFICATES of
<i>Ambrose Dickens Esq;</i> his
Majesty's Serjeant-Sur-
geon, <i>Mr. Williams</i> , and
several other Surgeons,
who examin'd <i>Mr. Weld</i> ; | V. The SENTENCE pro-
nounced by the Wor-
shipful Dr. <i>Bettesworth</i> ,
Feb. 15. 1731. |

To which is Prefixed,

A PREFACE, by the AUTHOR of
the Tryal of F. GIRARD and Miss CADIERE.

THE SECOND EDITION.

L O N D O N:

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[Price One Shilling.]

THE WHOLE OF THE

PROCEEDINGS

IN THE

ALICE COURT OF CHANCERY

IN A CAUSE WHEREIN THE PETITIONER
HON. HUBBARD WELLS

PLAINTIFF
VERSUS
THE HUBBARD WELLS

DEFENDANT

CONTAINING

THE PETITIONER'S EXHIBITS	THE DEFENDANT'S EXHIBITS
1. A copy of the petition filed in the Court of Chancery on the 10th day of January, 1877.	1. A copy of the answer filed in the Court of Chancery on the 15th day of January, 1877.
2. A copy of the decree of the Court of Chancery on the 20th day of January, 1877.	2. A copy of the decree of the Court of Chancery on the 20th day of January, 1877.
3. A copy of the report of the referee on the 25th day of January, 1877.	3. A copy of the report of the referee on the 25th day of January, 1877.
4. A copy of the decree of the Court of Chancery on the 30th day of January, 1877.	4. A copy of the decree of the Court of Chancery on the 30th day of January, 1877.
5. A copy of the report of the referee on the 5th day of February, 1877.	5. A copy of the report of the referee on the 5th day of February, 1877.
6. A copy of the decree of the Court of Chancery on the 10th day of February, 1877.	6. A copy of the decree of the Court of Chancery on the 10th day of February, 1877.
7. A copy of the report of the referee on the 15th day of February, 1877.	7. A copy of the report of the referee on the 15th day of February, 1877.
8. A copy of the decree of the Court of Chancery on the 20th day of February, 1877.	8. A copy of the decree of the Court of Chancery on the 20th day of February, 1877.
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10. A copy of the decree of the Court of Chancery on the 30th day of February, 1877.	10. A copy of the decree of the Court of Chancery on the 30th day of February, 1877.

FORWARDED BY THE ALICE COURT OF

CHANCERY

ON THE 10th day of January, 1877.

LONDON

PRINTED BY THE ALICE COURT OF CHANCERY

ON THE 10th day of January, 1877.



PREFACE.

ASES like that which is examined in the following *Pages*, have met with so good a reception from the *Publick*, that I do not think it necessary to bespeak their Favour here. But shall, on the contrary, employ my *Preface* in removing certain *Objections* raised against *Treatises* of this nature; and which sometimes carry with them Imputations on the *Judgments* and *Morals* of those, who are known to peruse them.

Affliction of Modesty is sometimes almost as great a Fault, as the *Contempt* of it; yet this *Affliction* it is which so often deceives the World in their Opinions, and not seldom even imposes on those who practise it, in their Sentiments of themselves. Hence it is, that a censorious Party reflect on Writings of this sort, as if they trespass'd upon *Decency*, and were never read but from a Wantonness of Inclination. I shall not be so uncharitable as to say, that there are of his Party who would start at Words, and not boggle at Things. But this I may observe, that Pieces of this Cast may be written without offending the most exact Decorum; and consequently be read, without sullyng the chastest Mind.

Matrimony is found, by the Experience of most Men, to be an Affair of the greatest weight; and the Ladies, if we may credit themselves, do not find the Load on their own side more easy. The Secrets of the Marriage-Bed very often are the Source of those Inquietudes, which render both sides unhappy. If therefore, in any such Cases,
the

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the Law of God and the Land may void the Bonds, certainly it is an Base to both, and an Injury to none: but if Things be so that they admit no Remedy, it seems proper that the Parties should know it; and by making the best of a bad Bargain, drag on the Chain of Wedlock as well as they can.

The want of full and direct Treatises to this Point hath occasion'd many and fatal Distractions in Mens Sentiments relating thereto. *HENRY* the Eighth, when he first entertain'd Scruples, as to the Lawfulness of his Match with his Brother's Widow, found nothing written on that Head, which could in any degree settle, even his own Judgment as to the Legality of the Matter. In order therefore, to be settled in a Point, which so nearly concern'd him and his Posterity, he put himself to vast Expences in soliciting the Court of *Rome*, then the sole Dictator in Cases of Conscience; and when he found that ineffectual, sent to all the Universities in *Europe*: which, if no sinister Practices were made use of in procuring their Opinions, was undoubtedly a very prudent Method. The Eclat, therefore, that this made, occasioned several learned Disqui-

inquiries to be written on the nature of the Divine Laws, and how far they were to be dispens'd with in relation to Marriages amongst Persons nearly related.

Princes stand in so full a Point of Light, that every thing relating to them is fancy'd as a publick Concern; and either from Interest or Pique comes to be consider'd accordingly. So it happen'd in this Case, so many Books were publish'd on one Side and t'other, that the whole of what could be said in relation to *Marriage* seem'd utterly exhausted: nay, even the legal Doctrine of *Divorce*, as it sprung from the main Question, was accurately handled; and yet when another *Royal Case* came to be talk'd of, a new Field of Enquiry was open'd, which afforded as much room for Argument as the other; tho' less Certainty appear'd in their Conclusions.

I mean the Case of King *CHARLES* the Second and his Queen *Catherine*; the Point then debated was, Whether a *Woman* naturally barren could, according to the Laws of Nature, contract *Matrimony*? This was

was look'd on as the Converse of the following Case; and the Reasonings made use of in the Enquiries relating to it turn chiefly upon this Topic. That *Sterility* in either *Sex* destroying the End of *Marriage*, the Forms of bringing the *Parties* together as *Man* and *Wife* ought not to be consider'd, but the *Contract* be look'd on as *void*, since it could not have that *Fruit* proceed from it for which it was intended. Whether any Disquisitions on this Head were then publish'd, or whether they were confin'd only to Discourse, which frequently rolls on what relates to *Princes*, I cannot determine. Two *Dissertations* have been of late Years publish'd, and said to have then fallen from the Pen of a *great Divine* at the Request of that *Prince's Minister*, one, which expressly treats this Query, and the other containing some Thoughts on *Polygamy*, which, as is common enough on such Occasions, came in as a secondary Dispute. Whither those Papers really belong to the Person whose Name they bear, I cannot take upon me to say: but 'tis certain, that speaking of what was said on these very Heads, in the History of those Times, he calls

calls such Arguments a Scandal to the *Christian Name*.

There is very little doubt to be made that King *CHARLES* would have been well-pleased to have had his *Marriage* dissolv'd; yet, when these Discourses on the *Barrenness* of the *Queen* were mentioned, he entirely relinquisht that Point, by declaring himself satisfy'd of her having been once with Child. Yet, apprehending the *Laws* of the *Kingdom* sufficient to support him in a Divorce, he gave way to that; and when a *Bill* was brought into *Parliament* for dissolving the *Marriage* of *Lord Roos*, he seem'd to look on it as a Precedent, and encouraged it all he could. The *Duke of York*, therefore, who consider'd it in the same Light, oppos'd it as warmly; and so, many long and learned Arguments, with respect to *Matrimonial Laws*, came to be made publick, and the *Laws* of the *Land* explain'd in relation thereto.

It appears, therefore, from these Instances, that Discourses of a nature like this are highly useful, since they serve to settle
People's

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People's Minds in the tenderest Points; Points, which not only affect the Quiet of themselves, but often that of others; and sometimes (as in the Cases we have mention'd) even Society itself. It may, perhaps, be objected, that when People feel Scruples of this nature in themselves, they will be ready enough to seek for Satisfaction, by consulting those with whom it is proper to advise in such Affairs; and that such Treatises, instead of clearing Difficulties from the Reasonings they give upon them, rather tend to increase them, by the great variety of Questions, which in such Disquisitions necessarily rise out of one. But to this the Answer is easy. The Abuse or Difficulty under which any thing labours have never been thought just Arguments against the use of it: besides, what is here complain'd of is circumstantial, accidental, and easily to be avoided; whereas, the Advantages that rise from it are certain and very extensive.

Those who insinuate that Discourses of this nature tend to indulge Men's brutal Inclinations, by leaving them many Excuses

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for

PREFACE.

for changing those to whom otherwise they are, and ought to be bound for Life: and that it gives Opportunities also to some of the other Sex taking Methods which do not so well agree with the bashful Modesty, which universal Consent seems to have establish'd as a Female Ornament, are led into such Notions from vulgar Apprehensions, and for want of examining thoroughly that which they condemn: For the Truth is, these Proceedings are ever intended, and not seldom answer the End of repressing Lust, and taking away the Occasion of illegal Flames.

For Example, in the Case of K. HENRY, certain it is, that his Marriage contracted against the Laws of God, might reasonably be supposed, on Reflection, to give him Trouble. The French Ambassador question'd the Legitimacy of his Daughter MARY. This gave Birth to Inquiries into the Validity of the Pope's Dispensation, which could only remove the Blemish from her, and the Load of continued Incest from her Father. The more this was examin'd the less Reason there appeared to make Men be-

Believe, even on the Principles receiv'd in those Days, that the Power of the *Romish Prelate* extended so far as to cancel the Laws of *Scripture*, and of *Nature*. This might well increase the Anxiety of the King's Mind; and from a very Christian Principle beget a Desire of Separation: nor without manifest Injustice can it be deny'd, that his Inclination to the Divorce was more agreeable to Reason and Religion than Queen *Catherine's* Aversion. I do not pretend to vindicate the Design upon which *HENRY* did this; for I do not so much as presume on its Knowledge: His sudden Marriage with *Anne Bullen* was indecent, but his parting with Queen *Catherine* ought, I think, to be spoke of in other Terms than it is, unless Regard for Form, and a Complaisance for the Judgment of the Many, are allow'd to ballance inward Uneasiness, and the Stings of Conscience.

True it is, that vicious Persons often turn such Writings as these into Fuel for their Lust, as bad Stomachs turn all Victuals into Phlegm: but those who consult them to ease their Minds, and settle their

Consciences never more tortur'd than from Evils of this Stamp, will not entertain a worse Opinion of them for that: they will in this Collection see in one View, what the Laws of God, of Nature, of the wisest Nations, and of this Kingdom in particular, decide as to the Nullity of Marriages where either of the Parties are impotent; a Point, in the Elucidation of which, the most curious Learning is shewn; and a right Apprehension being from thence gain'd, may be of Use on the most important Occasions.





PROCEEDINGS

IN THE
ARCHES-COURT of Canterbury

Between
The Hon. Mrs. CATHERINE WELL,

AND
EDWARD WELL, Esq; her HUSBAND

ON A
Citation for INSUFFICIENCY.

Determined

By the Worshipful Dr. Bettesworth, Judge of
that Court; February, 1731-32.



IN order to give my Readers a
just Idea of this Affair, it will
be necessary to begin with the
Form of the Libel against the
Defendant, which answers nearly
to our Declaration in Common
Law, or nearer still to a Bill in Equity, and
is the Foundation of all the subsequent Pro-
ceedings in the Cause.

The

The LIBEL promoted, &c.

I. That she was duly and legally marry'd at such a time to the said *Edward Well*, Esq;

II. That she was at that time of an Age marriageable, and in a fit State to receive the Rites of her Nuptial Bed.

III. That the said *Edward Well*, Esq; was at that time of a reasonable Age, and in all outward Appearance, in a fit Condition to have consummated his said Marriage; and hath so continued ever since without any Sickness, Disease, or other Malady, which could reasonably be supposed to hinder him from such Ability.

IV. That yet for the Space of three Years since the pretended Marriage, the said *Edward Well* hath never consummated his said Marriage, notwithstanding Time and Place did serve, as in the Cases of other marry'd Persons^d and she, in hopes of lawful Issue, and to be made a Mother, did live with the said *Edward Well* at Bed and Board, and lay both naked and alone in one Bed as marry'd Folks used And being desirous to be made a Mother, did again and again put and yield herself into his Power, and as much as in her lay, offered herself and her Body to be known, and earnestly sought and desired Conjunction and Copulation.

V. That notwithstanding such proper Seasons and Opportunities, such yielding and Tender of her Person, the said *Edward Well* hath not, nor ever did consummate his Marriage

riage with her, or know her in any sort as the Marriage-Bed alloweth.

VI. Furthermore, she averreth, that during the whole Space she hath been able, fit, and capable to have received the Embraces of a Man; and is such a One as may be known in Marriage: nor hath any Impediment whatsoever.

VII. Moreover, she doth averr, that during all that Space she hath continued, and still is a pure Virgin free from any Conjunction with her Husband *Edward Well*.

VIII. And she doth further averr, that at the time of such her Marriage as aforesaid, she was totally ignorant, and utterly unacquainted with the said *Edward Well's* having any such natural Infirmary and perpetual Impediment.

IX. That the said *Edward Well* hath declared to several Persons, long before the commencing of this Suit, that he was incapable and unable to perform the Conjugal Rites, by reason of some natural Imperfection which he well knew in himself.

X. That she had thus long, viz. for the Space of three Years, out of Female Modesty, declined making any Complaint, or seeking any legal Redress from this Cohabitation; and had done so still, but for some good and cogent Reasons, which instigated her to such a Separation.

XI. Which, considering the State of the Case, and that this Marriamony was only *in fact*, and not in right, she requireth it may be pronounced,
dec'ar'd

explained, and adjudged as void and of no force, and that she may be freed and quitted from all Bonds and Knots of the same, by your Sentence and Authority.

The ANSWER of the Defendant

WAS in general, as to the first Articles, that they were true. As to the material one, *Whether he had consummated his Marriage with his Lady*; he said, he believed he had twice. And so on this the Points came to be argued.

It was argued on the Part of the Lady, and in Support of the Label in the following Terms.

THE Right the Injured have to the Redress of the Law, might well supply the Place of any Apology for demanding it, did not the natural and amiable Modesty inherent to the Female Sex seem to extort something by way of Excuse for our Appearance on this Occasion, which however legal, however necessary, is yet somewhat extraordinary. The Birth, the Education, the Character, and the long Forbearance, even in this Case, of my Client, are sufficient to justify us in the Minds of reasonable Persons, as to that Unwillingness with which it is brought on at last. And the Reasons which in the course of our Argument will be shewn to have moved it, I make no question are of force enough to remove those Objections with which some who have too scrupulous a Modesty, are apt to charge such Proceedings.

The Laws of God, the Dictates of Reason and of Nature, lead both Sexes to the Desire of Ma-

Matrimony, as the perfectest State of human Being, by which the Comforts of Life are best enjoy'd, its Evils more easily alleviated, and the Goods which Providence permits to be left behind us secured to those who are our Offspring, and as it were Parts of ourselves. These Blessings, as they are grateful to Individuals, so also are they of the utmost Consequence to Society, and have therefore claimed the Care of the best and wisest Legislators, who have encouraged, by all means possible, young Persons to enter into that State, which is most likely to render them quiet, industrious, and beneficial Members to the Commonwealth; to whom, in their Children, they give as it were Pledges for their own good Behaviour.

But as the best Things, when corrupted, become the worst; so, in respect to Marriage, there happen sometimes such Misfortunes therein, as totally destroy those benign Consequences for which it is desired. The Care therefore which Civil Government hath of Posterity, requires that it provide suitable Remedies for these Misfortunes, which may either prevent their falling out, or rectify the Evils they occasion when they have fallen out, the Source of those Proceedings on which Nullities and Divorce are founded.

The Definition of Matrimony in the Civil Law, is, *Nuptia, sive Matrimonium Viri & Mulieris Conjunctio Vitæ Consuetudinem continens.* It follows then, that the Parties contracting this Bond for Life, are to be Man and Woman, that is, to have Powers of both Sexes, and a Capacity of such a Conjunction as may produce Issue. This then being the Nature of this

Contract, an Appearance will not do; for that is a Fraud only on the Person who hath Ability, and a deceiving him or her into such an Agreement as the Intent thereof cannot be fulfilled, and from the Equity of the Laws is therefore to be considered as void.

Something there is indeed, as to the same Title of the Civil Law, explain'd in the Pandects, which at first sight may seem to contradict this Position; and it will be therefore proper to obviate this Difficulty as we go along. The Words are these: *Conjunctionem accipere Animum, non Corporum; Nuptias enim non concubitus, sed consensus facit.* This Conjunction, that is, the Conjunction before defined to be Matrimony, we are to understand as a Conjunction of Minds, and not of Bodies; for it is not the Consummation, but the Consent, that makes a Marriage.

But the Meaning of this will be easily found to be agreeable to what we have advanced: For this Consent, which is agreed to be the Essence of Marriage, is founded in the Belief each Party hath of the Ability in Sex of the other; and if there be any Imposition in this Respect, the Terms on which the Consent was given are overturned and agreeable therefore; both to Reason and Law, the Consent, that is, the Marriage, becomes void.

It is true, some Dispute may arise from a wilful neglect of a Wife, whether this which has in a famous Case been stiled *Maleficium versus hanc*, be a Case which can incur Nullity? and many learned Arguments it has occasion'd but that has no relation to ours. It

is also true, that if the marry'd Parties, by a new Contract between themselves, agree to have no carnal Knowledge the one of the other, as some in the darkest Days of Popery are said to have done, it doth not void the Marriage: for the Parties concerned are fully apprized of what they are doing; and it is the Deceit, or Imposition only of one Party on the other, which we contend ought to induce the Court to pronounce such a Marriage void.

The Randoes themselves also admit it, as an Error in the Essentials of Marriage, that there should be an Inability of Generation in either Party, and allow that it is sufficient to null the outward Forms of the Contract. *Et inanis fit in substantialibus Matrimonii illud substantia non potest.* And C. 1. 2. X. de *frigid. & mal.* is directly to the Point; and proves the whole Current of the Civil Law runs with our Opinion.

We have gone thro' this at once, that our Reasonings may appear to have the better Weight, when it is considered that the Roman Law, which extended itself farther than their Conquests, leans on the same Support. We shall go on now to examine the Canon Law also on this Subject, and when we have from thence and from the Scriptures proved that such a Nullity is agreeable to the Doctrines of the Christian Faith; and from other Arguments, that it is consonant alike to Reason, and to the Laws of this Kingdom, we think there will then remain nothing to hinder or retard such a Sentence from this Court as we pray for.

is also true, that in the many'd Parties, by
 The Canon-Law doth not in its Definition
 differ from that of *Julianus*, which I have
 cited, except in its adding these Words: *Can-*
onicis & humanis Juris communicatione. The
 Canonists accounting Matrimony a Sacrament,
 and dwelling much on the Myſteries inrodded
 under it, as that of the Union between CHRIST
 and the CHURCH; &c. have carried every
 thing relating to it to the greatest Height,
 distinguishing between the temporal Concerns
 of married People, which they leave to the
 Determination of the Civil Law, and the
 more abſtracted and religious Part of Matri-
 mony, viz. the Nature, Extent, and Obliga-
 tion of its Vow, the Explanation and Direction
 of all which they are for reſerving to them-
 ſelves.

Yet in the *Lyon* Edition of the *Inſtitutes*
 of the Canon Law, printed A. D. 1588, by
 the Authority of the Pope, and with the King
 of France's Privilege, the Gloſs is very full on
 theſe Words, *Viri & Mulieris conjunctio*, wherein
 it is obſerved, that a Difference and a Potency
 in both Sexes is required in Marriage: for, as
 is there ſaid, though *Nero*, the moſt lewd and
 infamous of the *Roman* Tyrants, publickly
 own'd himſelf eſpouſed to *Sporus* a Eunuch
 and a Catamite; yet ſuch a thing could not
 be, becauſe it is directly contrary to the Laws
 of Nature and of Society: Where alſo 'tis well
 obſerv'd, that at the Creation, the Wiſdom of
 God's Providence provided for a right Inſtitu-
 tion of Matrimony, by not making two Men
 or two Women, but firſt *Adam*, and then *Eve*,
 from whom, in the ordinary Method of Propa-
 tion, all the reſt of Mankind are deſcended.

Through.

Throughout the whole Title on that Subject, although every thing is said that can recommend its Mystery, and pass it on the People as a Point of the most sacred nature; yet, with respect to Impotency, they are clearly of the same Mind with the Civilians, and declare in express Terms against such a Practice as this of Mens marrying, when unfit and unable, thro' some perpetual Malady or Impediment, to perform the conjugal Rites; and by propagating his Likeness, to answer the Intent of the Matrimonial Contract.

Tit. XII. Item Frigiditas & coeundi impotentia legitimam Matrimonii impedimentum adferunt. Sic qui ita sunt natura impotentes, ut nec ope Medicorum, sine Mortis periculo juvari possint, apti ad contrahenda Matrimonia minime putantur.

There is an Explanation of this Impotency, or perpetual Impediment to Coition follows, which will be mentioned particularly when we come to our Proofs: but it is, however, proper to mention the Reasons assigned for this manner of treating Matrimonial Contracts, where Inability for conjugal Rites are found, and they are these, 1. That Marriage, by a lawful Enjoyment, being intended to suppress the Fires of Lust, such Excesses to carnal Desire as must arise from the Cohabitation with a Man, and those Liberties of lying in Bed naked, and alone with him, will greatly inflame the natural Stirrings of the Flesh, and so become a stumbling Block and source of Temptation, instead of answering its appointed End. 2. The Dowry which the Wife brings

brings the ought to bring to a Man; for it is intended for the support of such Expences as the Woman, by reason of her Sex, particularly in regard to her bearing and breeding up her Children, brings upon him, and bestowing this on one who is incapable of begetting Children, is against Reason and Equity. 2. Such Contracts are highly injurious to the Commonwealth, of which the Number of its Subjects are its greatest Riches, and its strongest support: and as all Laws human and divine command us to look to the Publick Good, so is it by no means fit that the Error of Nature, or rather its Defect in the Conformation of one Person's Body, should become the means of rendring another unfruitful, especially where the Dissolution of the Marriage is grounded on Reason and Religion, and turns to the Damage of none.

This is what the Canonists say with respect to Matrimony, and the Obligation of its Contract in the Matter of Divorce; their Sentiments are yet plainer, as the following Passage, p. 232. Infit. J. C. fully proves. *Item. si qui ignarus virginem in uxorem duxerit, quoad ardua sit, ut Mulier fieri non possit, vel simile vitium a Natura contraxerit, ut ope Medicorum non possit adjuvari. Aut Mulier Venerem acciperit qui adeo frigida sit, Natura ut eadem carnaliter comisceri non possit, poterant utriusque separari: Et qui Matrimonio aptus ante ad secundas nuptias libere transitum facere.* So if any one ignorantly take to Wife a Maid so straitly fashioned that she cannot be made a Woman, that is, be carnally known; or if any other Ail of the like nature be upon her, which cannot be remedied by Physick;

or,

as if a Woman, on the other hand, marry a Man of such a Constitution, as that it be not possible for her to have Copulations with him, it shall be lawful to separate either, and to suffer which of them is found fit for performing the Rites of Marriage to make another Choice. The very Law to which we reduce our present Case.

The Gloss is here again very full, and to the Purport of the former, insisting on the Illegality of tying up a Person made capable of such Acts by Nature for a Person to whom Nature has denied the same Powers, which is further illustrated by the Commentator, who mentions a Power in the Pope to dissolve a Marriage where Impotency happens to either Party contracting, and even consummating Matrimony, grounded on the same Reasoning, that it is exposing the sound or capable Party to great Temptations to Incontinency, against which it is most fit the Power of the Church should provide.

The Gallican Church also declares itself in the same Terms, and assigns the same Reasons, nor are Parallel Cases wanting, in regard to their Decisions, according to their Judgments delivered in their Books, especially in an Institute or Compendium publish'd by the French King's Leave, A. D. 1687, at Paris, with this Title *Examen Juridicum in Jure Canonico, seu methodica manductio ad Jus Pontificum tum commune, tum apud Gallos receptum*. Wherein it is declared, that Persons in no Capacity of having Issue ought not enter the state of Matrimony, and if they do the Law is to interpose in Favour of which ever is capable, and de-

declare the whole Contract void, as we have before said. The best and wisest Writers of the more early Ages agreed also in this Point fully, insomuch that scarce any Nation in Europe hath neglected it, but have settled its Legality by a direct Law for such Dissolutions founded on such Reasons: And the same will, I hope, prevail for our obtaining such a Dissolution here.

The Law being as clearly and as fully shewn as it is in my Power, and every thing tending to prove so strongly the Compliances made in this respect by all the World, upon Views agreeable both to the Principles of Christianity and civil Society, it is fit we close this Subject by adjoining one Prayer in the present Case, That the young Lady, who is a Person of Quality, may be adjudg'd to be at liberty to marry again, and part from him who is of so cold a Constitution, or of such Impediment in his Body, that she the said Complainant hath not in three Years space from the time of the pretended Marriage lost her pure Virginity; all which she submits to the Course of this Court for the Determination of the Truths herein mentioned: and in saying this she closeth her Demands, and relieth solely on the Wisdom, Integrity and Goodness of your Worship.

Depositions on the Part of the Complainant.

The Interrogatories were first perused, and the Husband's Answers with nineteen Letters from him to his Lady, the Contents of which fully proved the Matters in Question, that is, in the time of the commencing of the Process.

The

The Lady ~~Howard~~ deposed, that the Defendant *Edward Well* was well known to her. That she is acquainted with the Uneasinesses in his Family, in relation to the Point in Question. — That she hath seen the said Mr. *Well* in his Study at Two o'Clock in the Morning. — That she hath spoken to him on this Head as far as Modesty would permit. — That he hath owned to her the Truth of the Charge of Insufficiency, at least, that he believed himself so.

The Right Honourable the Lord ~~Almon~~ deposed in respect to the Matter in Question, that the Lady his Daughter hath made Complaints to him on this Head. — That the Defendant hath acknowledged the Substance of them to be true.

His Grace the Duke ~~of Devon~~ deposed also, in respect to Acknowledgments made by the said *Edward Well*, as to his Inability, and the Concern expressed by him on such Confessions.

~~Cultror~~ Esq, deposed in some respects to the same Facts mentioned in the other Depositions; but more particularly, his own discoursing on this Point to Mr. *Well* in very serious Terms. — That Mr. *Well* expressed to him the Uneasiness and Concern he was under in this respect, acknowledged the Charge to be true, and that he had never consummated his Marriage. — That, to be freed from this grievous Infirmity, he intended to apply himself to Dr. *Mead*. — That he afterwards told him he had apply'd to Dr. *Storber*; and on his Advice to a Surgeon, who did something for removing his

his Impediment; which (as he said) had in some measure Succeeded, and strengthened his Member so as to render him fitter for Generation; yet he could not but own that, as yet, he had not consummated his Marriage, even after all that had been done to him by the Surgeon, and of which he had expressed such Hopes.

A further Deposition of — *Cultrce*, Esq; in which Mr. *Well* owned to him not only what is mentioned in his former Deposition, but also descended into Particulars, as to his Incapacity, which he explained to him thus. He said, that as often as he attempted to have carnal Knowledge of his Wife, a Pain struck him cross his Belly, which so contracted his Privy Parts, as to put him in much Torment, and obliged him to desist from further Careless.

The Certificate of three experienced Midwives was read, declaring the Lady to be a pure and untouch'd Virgin; that her Parts of Generation were in such a state that she was capable of conjugal Embraces, no Defect in Form or otherwise appearing: that they were, however, convinced, on their Inspection, that it was impossible she should have had any Conversation carnally with a Man.

The strongest and clearest Proof offered was from a Letter of Mr. *Well's* to his Lady, of a late Date, in which was this Passage, after a tender Intreaty to retire into the Country; *I shall follow you very quickly, and if we cannot there enjoy one another as Man and Wife, let us be content to live together as Brother and Sister.*

On these Testimonies the Complainant rested.

They being however strengthened and enforced in the following Terms.

The Laws which indulge a Separation in Cases where the Ends of Matrimony are impeded; and which give Power to dissolve its Contract when there is a perpetual and insuperable Bar to its being consummated at all, have already been very fully explained: but, as the Transactions of the Marriage-Bed are in their nature secret, and the natural Modesty of the Fair Sex so great, as to lay all possible Restraints on them in this respect, there's no Wonder that so few Cases are to be found to direct the Judgment with respect to the Proofs, which are legally required to make out a Charge of this kind.

Yet, as far as Precedents are found, as far as any Authority ever required, or Reason itself can dictate, the Evidence produced in the present Case doth apparently reach: For, with respect to the Answers made by Mr. *Well* to the Interrogatory, it is plain, that endeavouring at Consummation, and that but twice in three Years, is all that he himself can pretend. The Letters, tho' they speak not all of them in the fullest Terms, yet are sufficiently plain to shew his Uneasiness, as to his Capacity in Love-Affairs; and their Obscurity is yet a clearer Indication of his Imbecility. From his Confusion, there is a strong Presumption, since it is a Point in which, where, if a Man were capable, no Occasion can ever happen to induce his writing on it; and where his Defects force him

him on Excuses, no wonder if his Efforts there be as weak as his Efforts elsewhere, and the Marks of Shame and Disappointment appear alike in both. In the Case of Lady *Francis Howard*, and the Earl of *Essex*, his Answer was thought insufficient, because he turn'd it wholly on his want of Inclination, instead of Inability in Body. In this Case, all that was required by the Judges against that dissolving Sentence is fully proved by the Confession, and even by the Answers made by the Defendant to these Interrogatories. The Proof of the Lady's Condition, from the Testimony of skilful Witnesses, is the next thing required; and this too has been strictly comply'd with. The Verdict of those Women reported her *Virgo intacta*, and further say, that she is in herself every way capable of the Nuptial Rites; and of consequence the Error can be only in her Husband; which is all we think that ever was or can be expected, to shew the want of Virility in a Person marry'd.

To make every thing yet more clear, in a subsequent Deposition from the Mouth of the said *Edward Well*, it is shewn what the very Point was, in which he is thus imperfect. Whenever he attempted to converse after the manner of marry'd Persons with his Lady, the Gentleman whose Depositions are fullest says, he, Mr *Well* told him a Pain came across his Belly, which so contracted and drew up his Privy Parts, that he was immediately obliged to give over the Attempt: so painful indeed does it appear to have been, that but twice in three Years could his Desires move him strongly enough to venture it; and, upon his Application to a learned

trained Physician and afterwards by his Advice
to an able Surgeon with whose Helps he was
much pleased: Yet so hard is it to rectify the
Mistakes of Nature, that he owned the Appli-
cations had not their Effect, and that he was still
in the same sad state of Insufficiency.

The time limited by the Canon Law, and
which seems to have been received from thence
throughout all *Europe* is three Years; and indeed,
if in that space no Consummation happen, it
may be reasonably thought there never will
Weigh'd in the Scale of a candid Judgment, I
am confident this space must seem rather too
long than too short; for, if we consider the In-
certainty of Life, and then what Proportion
the time mentioned hath to the ordinary
Extent of it, and again compare the Length of
Years in which Women are capable of bearing
Children with this space, (three Years,) will
appear to be a long Tryal, equally hard on the
natural Inclinations the Sex are born with of
becoming Mothers; on the Parents who have
bestow'd large Dowries as a Provision for their
Posterity; and on Society in general, which may
with some sort of Propriety be said to have a
Right in the Marriageable to reap the Benefit
of their Issue.

Some Objection, I am sensible, may be made
as to the Laws of the Popish Canons; which
though till a full Supply be made of others for
the Government of the Church, still continue
to have weight; yet Necessity may stir up Zeal,
and the Protestant Religion be urged against
some of the Arguments brought in Favour of the
Complainant. It may be therefore proper to

move even the shadow of an Objection, that
 Notice be taken of the Judgment of some lear-
 ned and zealous Reformers, as to this very
 Point, which may well serve to take away all
 Pretext of Cavil, either as to the Legality of the
 thing we demand, viz. annulling the pretended
 Marriage, or of the Sufficiency of the Evidence
 to prove the Truth of what in the Libel and
 the Interrogatories we alledge. Philip Melancthon,
 whose Name will be for ever venerable amongst
 the Churches of Christ, delivers his Judgment
 on this Point in these Words, *Persona qua non
 sunt idonea ad commixtionem conjugalem nequa-
 quam sunt Conjuges, sed cum explorata est Frigi-
 ditas Judex pronunciet illas Personas liberas esse.
 Nec fit tunc Divortium quia non erat Conjugium
 juxta dictum Mat. 19. sed fit declaratio ut alii
 sciant, illam societatem non esse Conjugium Et Per-
 sons qua habet natura virtus integrus, concedi
 alium salicorem copulationem legitimam. Sed ad
 explorandam frigiditatem Fura tempus constituunt,
 si res dubia est, ne ante triennium fiant se junctio;*
 that is, Persons whose Bodies are not properly
 adapted to conjugal Commixtures, by no means
 are to be join'd together; but, as soon as the
 Frigidity is discover'd, the Judge may pro-
 nounce the Parties at liberty. Nor is this a Di-
 vorce, because the Contract was not really, and
 in itself a Marriage, according to *Mat. 19.* but
 that others may know that the Society which
 might have continued between the said Parties
 was not a legal Marriage; but that the Person
 who retains the full Power of Nature is at li-
 berty lawfully to engage in more happy Bonds.
 But for the finding out this Frigidity the Laws
 have assign'd a time, and if the thing be du-
 bious, three Years are to pass. Here is the Sen-
 timent

timent of a learned Divine, zealously addicted to the Scriptures, clear in his Judgment, and of wonderful Probity in his Morals; *Zwinglius*, who was a bitter Enemy to Popery, and to every Thing derived from thence which was not immediately deduceable from the Scriptures, yet concur'd in the same Opinion. And it were no difficult Task to name many more of the same Piety, Wisdom, and Zeal for the Reformation who have declared also in the same Strain, and avowed not the Expediency only, but Necessity of such Proceedings.

Since then the Civil and Canon Law agree in pronouncing void such Contracts, and since a settled Method of proving such a Charge of Impotency hath been established, since Cases have been accordingly determined both here and abroad; there seems to me no difficulty remaining unanswered, either as the Reasonableness or Legality of such a Dissolution as we in this Case desire, the Proof is certainly as clear and as strong as can be required, the Confession of *Mr. Well* leaves it without a Dispute, and the Certificate from the Inspectors fully satisfies every Form of Law, we therefore submit the Merits, the Proof, and the Decision of our Case to your Worship's Judgment, and doubt not of the Equity of your Determination in so clear a Point.

It was then urged in favour of *Mr. Well*, and against issuing the Sentence of Nullity in the Marriage, in Terms to the Purport of these.

As there is, it must be owned, great Occasion for Excuses to palliate the Conduct of the Complainant in this Affair, so the Necessary incumbent on us of answering and making our Defence, supercedes

persecutes all Cases of that sort, and carries in it a sufficient Apology for whatever in this Controversy may fall from us, which differs from that Purity of Thought or of Expression which on any Subject but this we should be assiduous to maintain.

The Dignity of human Nature is in no Point more concerned than in the matrimonial Bond. It arises from our Form and Constitution. It was celebrated first in the Presence of the Almighty, and by his express Institution it has been always, and in all Nations, considered as a Thing sacred, and the parting those so conjoined, looked on even from the Light of Reason as an execrable Thing. In the Civil Law the Solemnity of Marriage is not so much regarded as the Consent, the Form of the Contract, the Number of Witnesses, and the Ceremony which attends it, are intended only as to many Barriers to prevent its being broken and dissolved, the Publickness of the Thing rendering the Breach shameful, and therefore the more impracticable in either of the Parties, altho' the Essence of the Marriage lies only in the mutual Vow; which is rightly defined by Justinian, *Viri & Mulieris Conjunctio, individuum Vire Consuetudinem continens*. And yet, as was said of the Allowance of Divorces to the Jews, that it was because of the Hardness of their Hearts; so in the present Age, such a Hardness of Heart endeavours at a revival of them. And neither the Vow before God, the Consent of their own Minds, nor all the outward Ceremonies of Marriage, can prevail against the Fervour of a glowing Inclination, burning with the Desire of being released from the conjugal Chain, and to be left at Liberty to receive new Flames.

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These, whatever may be the Pretences made use of to recover them, are the real Sources, the true Grounds of this Proceeding, and all the Complaints which after three Years Cohabitation, and breeding Qualms, or at least what the Lady herself took for breeding Qualms, have been set up of Impotency, Insufficiency, perpetual Bars, and Impediments; and all the rabble of Terms invented by the Canonists, to gloss so unjustifiable a Fact, and encrease the Number of those Cases, which brought Money into their Purses, and created Applications and Dependency on the Court at Rome. To them are owing the nice Distinctions, the curious Disquisitions, into which Men have been drawn to deceive themselves into Quiet, while, under Colour of Law, they were seeking such Dispositions as were utterly illegal. It were absurd to deny that such Things have been asserted by the Canonists, since they have been produced; but we think there is no great Credit due to their Authority: And if there were, what we have to offer may go near to overturn it, since they who turned Dispensations and Divorces into a sort of Manufacture, have yet proceeded with great Caution, and left many Things in doubt.

We shall not stay at present to examine the Sentiments of the Canonists farther on this Head, with respect to the Absurdities and Contradictions their Divisions make in all Things in which they meddle. We shall have a proper Opportunity of entering again on this Subject, when we come to maintain the Proofs we are about to offer. At present it is sufficient, that we sift the Matter of Impotency or perpetual Impediment, and see what Foundation there is for the Assertion. On the

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other Side, that the fullest Proof hath in this Case been offer'd that Reason or the Law can require,

By Impotency, both in Law and in common Acceptation, is understood an utter Incapacity in a Man to have carnal Knowledge of a Woman; which if it arise either from a natural Infirmity, or be occasioned thro' any Accident before the Consummation of the Marriage, the Canon Law doth say, that the Contract is to be declar'd void. How far this is agreeable to Scripture, we shall hereafter enquire; but it is now sufficient Justification of our Client, to say that he is so far from having his Incapacity proved to the full, that we have the fullest and clearest Demonstration of the direct contrary: For if Confession be strong on his Side in their Opinion, much more is her Confession advantageous to our Cause. If this Lady, who has taken so extraordinary a Step as to lay open to the publick View Things which it is scarce decent for us to name; if she be really under such Concern for her Husband's Want of Vigour; if she is in such Necessity to have recourse to Law to force him on conjugal Duties; How came she ever to talk of Breeding, to pretend to Qualms and Sickneses? Did this look like having never had any Conversation after the manner of married People with her Husband; or was she then so ignorant as to suppose she might be with child without? That she did make these Complaints of Squeamishness, and such other Disorders as attend Pregnancy, we shall fairly shew. When that is done, I must leave it to better Judges than I, how this can be reconciled to Impotency. But 'tis fit we observe somewhat in relation to their Proofs of it, which may convince you of the Weakness of their Attempts in regard

to a Point on which they have declaimed so loudly.

In the first Place then, the Confessions of Mr. *Well* are talked of; and of them his Answer to the Interrogatory in relation to his Consummation of the Marriage is much relied on; and 'tis mentioned as if it had been a direct owning of the Charge. Whoever reads it, will find 'tis very far from it. He speaks cautiously indeed, and says only he believes he consummated twice. He believes, ay, what should he have said? Does not the Lady aver directly the contrary; and can any one know in what Strictness of Sense this Word Consummation is taken. I profess I do not, nor can I find any Definition even in the Canonists themselves of it. As to his other Confessions, they were occasioned by a Weakness he really had upon him, which might occasion some Complaints of his Wife, who it appears had no Temper to bear Disappointments of that sort. And if upon any Interrogations of his Wife's Friends he should have confessed it, I do not see what it will amount to; unless it should be suggested, that when for so long a Space a Man hath not had a Conversation with his Spouse, she is at Liberty to apply for a Nullity, in order to a second Marriage with somebody of more Vigour.

Some Depositions of their Side I think mentioned Applications to a Physician and Surgeon. Something also is said to have followed thereupon as to his Amendment. But he did not it seems consummate even after that. Well, and what can we make of all this? Mr. *Well* was very ill and weak. He was so much teized by his Wife, and so much importuned by her Friends, that he consulted Dr.

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of Lemnisech and (36) *Strother*, and by his Direction to a Surgeon, Proper Medicines had their Effects, and he grew stronger and more vigorous; yet, considering the Nature of his Disease, and how soon he might relapse, from an over-forwardness to gratify the Lady's warm Inclinations, he prudently forbore; and though, as shall be proved by the Oaths of the Surgeons, he soon after grew perfectly well, or in their beloved Terms, Sufficient; yet this short Indisposition is heightened into a full Proof of Impotency.

The Judgment of three Midwives, and their Verdict of her being an uncorrupt Virgin is next set up; but from whence this kind of Proof takes its Authority, I am at a loss to know: however, since it has indisputably been made use of in former Cases, we shall not contest its Legality now; only it will be fit to observe, that no such Scraps as this Verdict will really be supported by it, since they are People who ground their Opinions on vulgar Notions and common Experiments; which, if we credit the learnedst of the Faculty, are very fallacious in this nice Point. Nay, if we believe some accurate Anatomists, there is no determining with Certainty in this Matter, even upon the Body of a Woman dissected, where all things are open to the minutest Search. And in order fully to answer this Species of Proof, we have examined some of the most understanding Surgeons of the Kingdom to this very Point. Their Sentiments, as to the Degrees of Certainty or Uncertainty, will surely fully determine that Credit which their Evidence deserves.

But now, as a *Coup d'Eclair*, is added, the direct Confession of Mr. *Well*, as it is called. As to the
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the Nature and Occasion of his Impotency, he owned, we are told, that, upon any Attempt to converse carnally with the Lady, a Pain struck him across the Bottom of his Belly, which caused such a shrinking in his Parts of Generation, that he found himself utterly unable to pursue such a Design. This, like the rest, has been magnify'd into an incontestable Argument of perpetual Impotency; but with how much Truth it is not difficult to determine. The Time mentioned for this Confession to have been made in, coincides exactly with that Space in which Mr. W. acknowledges himself to have been under his Inclination; and if, on any Importunity of the Lady, he made such Attempts then, such Consequences might very naturally follow. And we think, an Impediment to Coition never to be removed, is not very certainly inferred from a Man's making no Secret of it, but speaking freely on the Subject to as many as asked him; and yet this is one of the strongest Reasons in the Judgment of the other Side why Your Worship should believe it.

Thus, without any straining, this mighty Strength of Witnesses, whose Evidence has been magnify'd into such a resistless Demonstration, is taken away without so much as going farther than examining if these sandy Foundations of general Expressions, Midwives Tales, and Histories of Marriage-Bed Transactions, are shaken with being but sifted; and all the Superstructure of Nullities and Dissolution of Contracts falls to the Ground of course.

We are next to proceed in exhibiting our own Proofs of Sufficiency in our Client: but, lest somewhat has been let fall in our Discourse in
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relation to their Management of Evidence, which may *prima facie* prejudice our own; it is fit, before we enter upon it, to observe a little the Nature of that of which we intend to make use.

First then, we must remark, that, though the Confessions of Mr. *Well* in general Terms cannot reasonably be made to bear that Weight which they would lay upon it; yet any Confession, as to the Lady's being satisfy'd of her Husband's having carnally known her, much more of his having impregnated her, is a full and manifest Contradiction of all that is said in the Libel or Interrogatories; so also, though the Verdict of three Midwives may be loose and uncertain, as to a Woman's Virginity, yet the Inspection of able Surgeons is sufficient to determine credibly on a Man's Capacity, because there is not the same Doubtfulness in both Cases; the Parts in the one Sex being obvious, and in the other not. The being indisposed is acknowledged, but if this happened after the Consummation of the Marriage it matter'd not, tho' it had been perpetual; nor ordinary Jurisdiction could thereupon have declared a Nullity. But this was far contrary, Mr. *Well*, as they have told you, apply'd for Help; we say, and we shall shew you, that he procured it, and that he is now vigorous, or as they term it sufficient, and in full Health.

Depositions on the Part of Edward Well Esq;

Against the Charge of Impotency imputed to him by the Libel,

1. Mrs. *Well*, Mother to the Defendant *Edward Well*, deposes, That the Complainant, her Son's Wife,

Wife, had told her within the first Year of her Marriage to her Son *Edward Well*, that she believed herself to be with Child by her said Husband the Defendant. — That she, this Witness, hath been several times present with her said Daughter-in-law the Complainant, when she was very squeamish, disordered, and indisposed in such a manner, that she took them to be Signs of Breeding.

2. Mr. *Williams*, a Surgeon, deposes, That Mr. *Well* had indeed some Impediment which lay in the inward Parts of the Privities in the seminal Vessels; but that he had given him some proper Assistance, by which he apprehended all That was removed: and he is now positively of Opinion, that the said *Edward Well* is capable and sufficient.

3. Mr. Serjeant-Surgeon *Dickens*, and several other Surgeons deposed, That, in their Opinions, Midwives were not capable Persons to form a Judgment whether a Woman were, or were not a Virgin; for, that it depended on an exact Knowledge of the natural Situation and Extent of those Parts, and a right Idea of those Alterations which happen on Penetration in.

4. The Answer of Mr. *Well* to the Interrogatory concerning the Consummation was also read, to shew that he did not therein positively own he did not carnally know her, but only that he believed he had consummated twice.

Upon this it was further urged,

That such Dissolutions were exceeding dangerous Precedents, since Complaints of Impotency were

were soon made; and if any Encouragement were given to such Proceedings, the most sacred Band and Union that is known to Mortals might be broken in an Instant, and Families on a thousand frivolous Pretences be turned into Confusion, and involved in Suits equally fatal in their Consequences, and scandalous in their Nature.

In the next Place, the common Law of *England* which decides on all Descents, and every thing that relates to Property, would have little Regard to such a Determination, in case, as the Surgeons have expressly sworn *Mr. Well* should be now sufficient, and after such a Dissolution marry'd again, and had Issue; or, if the like should befall the Lady, who is now so eager for this Marriage being nulled. The Children on both Sides would suffer, and their Parents, according to the Course of the common Law, must return to the same Cohabitation under this now to be broken Contract.

For so, *Inst. Jur. Can. Lib. 11. Tit. XVI. Si quis tamen coeundi impotentiam causatus post separationem aliam acceperit, aut ea qua arcta putabatur, aliquem invenerit, qui sibi seras reservet, utroque casu post peractum poenitentiam, ad priora Conjugia redire compellendi erunt.* That is, If any whose Marriage has been dissolved on the Score of Impotency, afterwards marry again; or, if she, who was thought incapable of receiving the Embraces of a Man, shall afterwards receive them, then in either Case, after Penance performed, the Parties are to be compelled to return to their first Marriage.

The famous Case of *John Bury*, Esq; of the County of *Devon*, in the Reign of *Queen Elizabeth*,

but is a proper Caution in respect to such Demands
 for annulling Contracts of Marriage, since such
 Nullities often occasion much Noise and Confu-
 sion; and instead of hurting none, as has been
 asserted on the other Side, almost always have find
 up implacable Malice in the Party declared in-
 capable, and the Consequences have not seldom
 brought a disreputation on the Court who pronounce
 on it. I shall in the Course of my Arguments shew.
 In order to which, let us return a little to the
 History of *Bury's Case*. His first Wife *Williamet*
 libell'd him for Insufficiency as to carnal Encoun-
 ters, and upon Inspection it appeared he had but
 one little Testicle, of the Size of a small Bean.
 The Ecclesiastical Court on this and other em-
 barrassing Evidence, gave Sentence with the Libel,
 and so far as they were liable annull'd the Mar-
 riage. *Williamet* quickly took the Advantage of this
 Sentence, and married again. *Bury* was not satis-
 fied with this Judicial Sentence of
 his Incapacity, but married also a second Wife *Phi-
 lippe*, by whom he had a Son. This afterwards
 drew the Succession to *Bury's* Estate into question,
 on the Legitimacy of this Son. The Common
 Lawyers were unanimously of Opinion that the
 Church Authority exerted in pronouncing the
 Nullity being plainly deceived in the very Ground
 upon which it went, that Sentence was in itself
 void, and the first Marriage between *Bury* and
Williamet remained notwithstanding in good force.
 Such are the Consequences that proceed from
 these Suits, such the Events which Divine Provi-
 dence suffers to follow on such Disjunctions as falsify
 the Supposed Pretences of Jealousy in married Persons,

contradict the positive Command of God in putting those asunder who are joined before him. The Consideration of them should deter the Ladies none would think from these Prosecutions; or at least they ought to weigh with a Court where such Matters are in Judgment, that so the Temper of Christian Equity may place as it were a Bar between the violent Desires of Women struggling to break loose, and that Bond ordained of God, commended of Christ, and the Ceremony of contracting which was honoured with his Presence. And last with some Reluctance I mention the Case of the Earl of Essex and Lady *Penelope Howard*, the most famous Instance in our Kingdom of a Sentence of this Kind, which was given by the Authority of a Court of Delegates, composed of the greatest Bishops and Men who were skilled in the Civil Law; yet notwithstanding the Solemnity of this Court, the Earl of Essex did not answer that he was a Virgin for him, the Word of his Spectacles, the Pomp of Compurgators, and all the other Colours which could be invented to gloss their Proceeding; yet so scandalous was this Decision in the Eyes of the World, that it lost the Characters of all those Judges who concurred in pronouncing Sentence, and fasten'd the Nick-name of *Sir Nullity* on one of the Sons of a Bishop concerned in it, when he was soon after knighted. *Matrimony* is by Law, by Custom, and by Nature, taken for so strong a Tie that every Suit on this Subject begets a Jealousy in married Persons, that Proceedings of a like kind may become common at last, and Men and their Wives parted whenever one or other shall think fit to exclaim against Impotency or Barrenness, and submit their

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naked Bodies to the Inspection of Surgeons or old Women. And whether such a Practice would not be against Reason, and at the same time destructive to Society, for whose Benefit such Zeal has on these Occasions been pretended, I submit to all. The best Test of the Truth of which is the Treatment afforded such Cases in the Houses of Parliament, where a Bill in a famous Case was rejected, tho' both Parties gave their Consents on the very Principle which I have laid down; and which will therefore I hope weigh so far in your Judgment, as to procure a like Decision here.

The REPLY II

The Strength of whatever is advanced in favour of Mr. *Wells*, and the Indissolubility of his Marriage, arises either from Exceptions taken to the Authority of those Laws whose Sanction has been urged, as to Proceedings of a like Nature, or from evil Consequences which may be apprehended to follow either from this Sentence in the present Case, or the Fear of its becoming a Precedent for the future. In order therefore effectually to answer these Objections, it will be necessary for us again to consider the Nature of Matrimony, as deducible from Reason and the Holy Scriptures.

It will not, I suppose, be disputed, even by the warmest Advocates on the other Side of the Question, that however Matrimony may have been instituted, it owes its Bond at present to the Laws of the Land; or, if that Term be liked better, to the Laws of Society: For these only, as the Learned agree, have made Adultery penal from the same Cause which induces all Penalties; because in its Consequences it is highly injurious to Society. Which as it is a Topic they have in some measure dwelt on as useful to their Purpose, I hope therefore

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fore a more full Explanation of it may appear
not altogether foreign to mine.
The great Injustice done in Adultery, and an
Injustice which they would fain graft also upon
this Process is, that it either deprives Children of
a due Support, or else puts the Expence of that Sup-
port, on them, who ought not to bear it; which in
either Case very fully proves that the legal Pro-
duction and Provision for the rising Generation, is
the chief End of Matrimony, and that which puts
it especially under the Care of the Legislature in
all Nations. If so, why should it be any longer
a Question, whether that Authority, or any infe-
rior Authority, to whom the Power of consider-
ing the Expediency of such Points is conceded,
should be able to dissolve that Bond, the whole
restrictive Force of which is derived from their
Sanction?

But tho' the Propagation of the human Species,
which is virtually commanded by the essential
Laws of Society, and expressly by the divine In-
junction of *Increase and Multiply*, be thus mani-
festly the great Purpose intended by Marriage,
and on which therefore 'tis the Duty of those who
enter its Contract to keep their Eye; yet some
would insinuate I know not what Reflections on
the Inclinations natural to the Sex, and make a
Jest of those Desires they express of being fruitful,
and becoming Mothers.

What I have said, may well suffice to shew
how unreasonable and how ridiculous such Sar-
casms really are; but, as they are material
Points in the Judgments of those on the other
Side,

Side, and as an Examination of them is here also to my Purpose, I will beg Leave to dilate a little on that natural Delight the Female Sex take in their Offspring; and which is, perhaps, strongly increased in the present Age from that Reproach to which Barrenness doth, and hath always exposed them.

For, as the Production and bringing up their Children, is what chiefly induces that tender Affection which Men have for Wives; so the want of Issue, if it lye on the Woman's Side, is apt to breed a Coldness in their Husbands towards, and is sure to render them reproachful to the World, let the Fault be where it will. Nor is this a Reflection of a late Date, but seems to have come down to us almost from the Creation. Thus *Hagar*, when fruitful, despised her Mistress; and when we consider that God himself styles it a Curse, and reckons it amongst the Marks of his Vengeance, there is less Reason to wonder at that Shame and Uneasiness with which the want of Children naturally afflicts Woman. And that he does so, is evident in *Hosea* 8, 9. *They sowe the Wind, and shall reap the Whirlwind: Their Glory shall fly from the WOMEN: Their Root is dried up, and shall bear no more Fruit, &c.* Joined with the Desires of Nature, may not this Scorn, stamp'd with the Anger of the Almighty, be prevalent enough with a young Lady, who brought a large Fortune, and fears no Difficulties in the bringing up Children, to desire them.

As, to what has been said in relation to the Consent's making the Essence of Matrimony, it has already been answered by an easy Retrospection to the Causes on which are founded that
Con-

Consent; and if in all Cases an Error in the Fundamentals vitiates all subsequent Proceedings, why not in this, where its Consequences are of such Importance? Nay, it would not, I believe, be doubted but that a Woman who had marry'd another Woman in Man's Cloaths, might have have that Appearance of a Contract dissolved; where then is the Difference in both Cases, they who pretend to be Men, and have the Appearance, but want the Powers of the Sex?

The Exceptions taken to the Proofs of Impotency are certainly very extraordinary, since, after all that is said against them, they have thought fit to follow them exactly Step by Step. Thus the several Depositions of Mr. *Well's* Acknowledgments of his own Incapacity are designed to be destroy'd by one single Testimony of a Confession of his Wife's, and that proved the Mother of the Defendant too. As to the express Cause which it is sworn Mr. *Well* assign'd of his Impotency, they think, it seems, that to own it, is to confute it; which, to me, I confess, is a new way of Reasoning, and past my Understanding; the three Midwives, Old Women as they are, make but Room for his Surgeons; and their Verdict and the Surgeons Depositions should meet Credit alike. And, as to the last Part in respect to Mr. *Well's* Answer, is it not brought to this Court as well by us as by you? We think *Believe* in this Case signifies little; and as to the Word *Consummation* and its Meaning, we can indeed tell what we mean by it, but do not pretend to know in what Sense Mr. *Well* took it, tho' we own we believe with him it means *Nothing*.

The

The Cavils next set up, are, That in safe Sa-
 tance should pass according to Desire, if Mr. Wall,
 as his Scribbles say, should have Knowledge
 of some other Women, and she should bring a
 Child, that then truly all would be undone again,
 and the Contract now to be broken is then again
 to take Place. We believe that there is no Danger;
 if there is, it lies on our Side, and I see no Reason
 why, if we make it our Election, we may not run
 in *Ulysses*'s Case, was indeed, an odd one; but it
 had no Effect when quoted by the Bishops and
 Doctors in my Lady *Essex*'s Case. And tho' so
 many hard Censures have fallen on those who de-
 cided it against the Validity of the Marriage, yet
 the Event did in some measure justify their Op-
 inions; since the Lord of *Essex*, tho' he ventured
 on a second Marriage, yet had not Issue by the
 Lady. So that in the present Dispute it has no
 just Weight.

Thus then having pursued the Thread of this
 Defence thro' all its Meanders; having shewn the
 true Nature and Extent of the Marriage-Contract,
 which is not here, as in Popish Countries, reckon'd
 for a Sacrament; having unravell'd the affected
 Mysteriousness which is by those on the other Side
 supposed to be concealed under it; justify'd our
 Proofs of the Charge of Incapacity on the Defen-
 dant; and cleared the Desire which Nature hath
 formed in Women of conceiving Children, from
 the Imputation of Immodesty: we have nothing
 on this Occasion more to add, than humbly to en-
 treat, that the Lady's Youth may not be thrown
 away, or she disappointed in her Desire of en-
 creasing Posterity, especially where so large a For-
 tune hath been brought, no doubt given with a
 Design

